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No. 96-1661

In The

Supreme Court of the United States

October Term, 1996

AMCOR CAPITAL CORPORATION,
a Delaware corporation, et al.,

Petitioners,

v.

WILBUR GOOLKASIAN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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LIST OF ALL PARTIES TO THE PROCEEDING AND LIST OF PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES REQUIRED BY RULE 29.6

The list required by this Rule has already been provided in the Petition for Writ of Certiorari, filed on or about April 15, 1997.

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. INTRODUCTION

Petitioners Amcor Capital Corporation, a Delaware corporation; Fred H. Behrens, individually and a general partner for certain Amcor limited partnerships; and Robert A. Wright, individually and as general partner for certain Amcor limited partnerships (hereafter petitioners are referred to collectively as "Amcor" or "petitioners") hereby submit this brief in reply to the "Brief for the Respondents in Opposition" ("Opposition") filed by defendants and respondents herein. In the Opposition respondents/defendants (hereafter "defendants") contend that "[t]he decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted." (Opposition, p. 7.)

Defendants have completely missed the point. The statute of limitations in this case should have been tolled or should not have accrued at the outset because, among other things, (1) at least one conspiratorial act unequivocally occurred during even the shortest possible statutory period, (2) conflicting decisions of the court of appeals for the Ninth Circuit failed to provide certainty as to the applicable statute of limitations for *Bivens*[1] claims, and (3) the lower courts erred in failing to toll the statute of limitations based on defendants' fraudulent concealment of the facts relating to plaintiffs' claims. In addition, at

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[1] *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

least on an equitable basis, the lower courts should have tolled the statute of limitations based upon the fact that a criminal investigation was pending. The lower courts erred in granting summary judgment because, as set forth below, triable issues of material fact existed which should have precluded a summary disposition.

II. AT LEAST ONE CONSPIRATORIAL ACT OCCURRED DURING EVEN THE SHORTEST POSSIBLE STATUTORY PERIOD

Defendants have not disputed the fact that on or about October 20, 1993 – a date within even the one-year statute of limitations period if that period of time is applicable (the original Complaint was filed on October 12, 1994)[2], an overt act occurred pursuant to the conspiracy alleged in the First Amended Complaint. The overt act in question was a letter sent by Gayle Morin, Assistant to the Commissioner of the Internal Revenue Service ("IRS") and one of the named defendants, to various United States Senators and Congressmen dated October 20, 1993 ("the October 20 letter"), in which she stated that the IRS had determined that the allegations concerning government misconduct relating to the facts of this case were unfounded. In fact, no such determination had been made. Nevertheless, Ms. Morin's conduct prevented the passage of a Private or Special Act of Congress which

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[2] As stated herein, plaintiffs dispute the applicability of any alleged one-year statute of limitations from the outset, in light of the fact that at all relevant times a conflict existed in the law of the Ninth Circuit court of appeals, as set forth more fully herein.

would have granted some relief to petitioners for the damage they had been suffering at the hands of the defendants. (Exc. 40, CR 40, pp. 10-13, ¶¶27, 32; Exc. 42, CR 42, pp. 8-9, ¶¶24-26.)

Defendants' contention with respect to this letter is as follows:

> The "evidence" on which petitioners rely appears to represent, if anything, allegations of "acts of concealment" rather than overt acts causing damage. It is well established in conspiracy law that "acts of concealment," committed after the central object of the conspiracy has been accomplished, and for the purpose of covering it up, are **not** part of the conspiracy for statute of limitations purposes.

(Opposition, pp. 12-13, footnote 8; emphasis in original; citations omitted.)

Defendants proceed from a thoroughly faulty premise. The October 20 letter is, plainly and simply, a lie. It is not merely an "act of concealment." It is a blatant and fundamental lie to Congress, made for the one and only purpose of inflicting harm on petitioners and denying them the right to redress their grievances. This letter does not merely accomplish or attempt to accomplish an act of concealment of prior wrongdoing. On the contrary, it affirmatively makes new and distinct factual allegations: that an investigation was conducted which exonerated defendants. In fact – and this fact is not disputed – such an investigation was never conducted. This was a material misrepresentation of fact. The purpose of the letter was to interfere with an attempt to pass legislation. This letter constitutes a violation of petitioners' constitutional

rights under the First Amendment to the United States Constitution to petition the legislative branch of government for redress of their grievances. It is a new and independent act designed to inflict further harm on petitioners – not merely to escape liability for harm previously inflicted – pursuant to the conspiracy. Summary judgment on the ground of statute of limitations was clearly inappropriate in light of such an allegation within even the briefest of the suggested statutory periods. At the very least, an issue of fact existed as to whether there was an overt act within the statutory period which would have mandated denial of the summary judgment motion.

It is irrelevant, for purposes of this analysis, whether the October 20 letter was specifically referred to, in so many words, in the First Amended Complaint. The allegations of the First Amended Complaint did not exclude such an allegation. Alternatively, the court in its discretion could have and should have, if there was any doubt, allowed an amendment, instead of terminating this case without recourse.

Accordingly, at the very least an issue of fact existed which should have precluded the entry of summary judgment on the basis of the statute of limitations. The lower courts should not have granted summary judgment in light of the sworn allegations in the Behrens Declaration regarding this letter.

III. CONFLICTING DECISIONS OF THE NINTH CIRCUIT COURT OF APPEALS SHOULD HAVE TOLLED THE STATUTE OF LIMITATIONS

Defendants state in their Opposition:

> Petitioners offer no authority in support of their contention (Pet. 16-18) that the statute of limitations should be tolled because of an unresolved intra-circuit conflict in the Ninth Circuit as to the applicable statute of limitations for *Bivens* suits. The intra-circuit conflict that petitioners describe is, in any event, illusory. . . .

(Opposition, p. 13; footnotes and citations omitted.) Defendants attempt to rationalize away the result in *Gerritsen v. Consulado General de Mexico*, 989 F.2d 340, 343 (9th Cir.), *cert. denied*, 114 S.Ct. 95 (1993) (discussed in original Petition for Writ of Certiorari at 16-18), which applied a four-year statute of limitations as opposed to the one-year statute which defendants claim is universally recognized, by basically ignoring the case:

> In *Gerritsen* . . . , the Ninth Circuit – apparently unaware of its then-recent decision in *Van Strum* – applied the California four-year catch-all statute of limitations in holding that a *Bivens* action was time-barred. The facts of that case evidently did not require the court to determine whether the one-year statute of limitations applied instead. With the exception of *Gerritsen*, which appears to be an anomaly and contains "no analysis" (Pet. App. 22), the Ninth Circuit has uniformly applied the one-year statute of limitations to *Bivens* suits in cases that arose after this Court's decision in *Wilson v. Garcia, supra*.[3]

This analysis is simply incorrect, as well as being unnecessarily dismissive of prior decisions of the Ninth Circuit. *Van Strum v. Lawn*, 940 F.2d 406 (9th Cir. 1991)

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[3] 471 U.S. 261 (1985).

had been decided two years before *Gerritsen*. For defendants to contend that the Ninth Circuit was "unaware" of this then-two-year old decision when *Gerritsen* was decided is ludicrous. Moreover, defendants' analysis does not even attempt to explain the Ninth Circuit's decision in 1992, one year **after** *Van Strum* was decided, expressly not to overrule *Marshall v. Kleppe*, 637 F.2d 1217 (9th Cir. 1980), which had applied the four-year catch-all statute. *Pelletier v. Federal Home Loan Bank of San Francisco*, 968 F.2d 865 (9th Cir. 1992). Inexplicably, the *Pelletier* case is not even mentioned in defendants' Opposition.

Recent decisions of the Ninth Circuit therefore do not consistently apply the one-year statute of limitations, as defendants contend. In light of the uncertainty caused by this intra-circuit conflict, petitioners should have been given the benefit of the four-year statute of limitations. At the very least, because of the conflicting authorities, summary judgment should not have been granted on the basis that the applicable statute of limitations was one year as a matter of law.

IV. THE STATUTE OF LIMITATIONS SHOULD HAVE BEEN TOLLED OR SHOULD NOT HAVE ACCRUED BECAUSE OF FRAUDULENT CONCEALMENT

In *Hobson v. Wilson*, 737 F.2d 1, 35-37 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985), the D. C. Circuit held that the running of the statute of limitations is not triggered until the plaintiff has an awareness of sufficient facts to identify a particular cause of action and knows the identity of the persons responsible for his or her

injuries. Defendants have not cited any case to the contrary.

Here, petitioners were caught between the proverbial "rock and a hard place" in that, prior to their determination of what in their opinion constituted sufficient facts on which to bring the lawsuit in 1994, they could have filed such a suit, but it would have been (1) factually inaccurate in material respects and (2) in violation of Rule 11 of the Federal Rules of Civil Procedure. Respectfully, it was an abuse of discretion for the lower courts to hold that petitioners should have filed their lawsuit years previously when they had no effective means to discover the true facts, as they were under criminal investigation (although no charges were ever filed) and could not have conducted discovery in a civil action without waiving their Fifth Amendment privilege against self-incrimination.

V. THE STATUTE OF LIMITATIONS SHOULD AT LEAST HAVE BEEN EQUITABLY TOLLED BASED ON THE FACT THAT A CRIMINAL INVESTIGATION WAS PENDING

Defendants contend that California Government Code §945.3 does not toll the statute of limitations on the *Bivens* claims because the (1) the statute requires that a criminal proceeding must actually have been filed, and none was filed here, and (2) the statute, when construed together with California Penal Code §830.8(a), does not apply to claims for relief against federal criminal investigators and law enforcement officers such as those sued

here. Again, defendants miss petitioners' point. Petitioners are well aware that the statutory tolling provisions referred to above have been construed by the Ninth Circuit not to apply to federal criminal investigators and law enforcement officers. *Matthews v. Macanas*, 990 F.2d 467, 469 (9th Cir. 1993). However, petitioners contend that the statute of limitations should have been equitably tolled, at the very least, because no good ground exists in fact or in law to treat federal personnel differently from their state counterparts. In effect, petitioners are suggesting that *Matthews v. Macanas, supra,* was wrongly decided and that the distinction between federal and state personnel made in *Matthews* makes no logical sense, in view of the fact that, as stated in *Van Strum v. Lawn, supra,* "Actions under [42 U.S.C.] section 1983 and those under *Bivens* are identical save for the replacement of a state actor under section 1983 by a federal actor under *Bivens*." 940 F.2d at 409. Thus, this Court should express its disapproval of *Matthews* in the context of the instant case.

Moreover, the fact that no criminal charges were actually filed against petitioners is fortuitous and should not be dispositive on the issue of whether the statute of limitations should have been tolled. It is undisputed that a grand jury was empaneled and was conducting an investigation of petitioners for several years until April 1993. Obviously no evidence was discovered and as a result no charges were filed. Nevertheless, as stated above, forcing petitioners to file a civil lawsuit while they were under criminal investigation, however ill-founded, would have required them to waive their constitutional rights. No one should be forced to give up constitutional

rights in order to avoid a waiver of other such rights, which is exactly what happened here.

VI. CONCLUSION

For all of the reasons set forth above and in the Petition, petitioners request that the Petition be granted.

Respectfully submitted,

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